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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER SESSION, 1967

No. 383

ALBERT C. LEE,
Appellant,

vs.

KANSAS CITY, MISSOURI,
Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT

LILLIE KNIGHT
709 Professional Building
Kansas City, Missouri 64106
W. RAYMOND HEDRICK
614 Law Building
Kansas City, Missouri 64106
Attorneys for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

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JURISDICTIONAL STATEMENT.

Appellant submits the following jurisdictional statement in support of the jurisdiction of this court on this appeal from the Supreme Court of Missouri:

1. (a) The opinion of the Supreme Court of Missouri from which this appeal is taken is officially reported as the case of *Kansas City, Missouri, Appellant* v. *Albert C. Lee, Respondent,* 414 S.W.2d 251. A copy of said opinion and the judgment of the trial court is hereto appended.

(b) The grounds on which jurisdiction of this court is invoked are as follows:

I. The validity of a municipal ordinance of Kansas City, Missouri, was drawn in question in this case on the ground that said ordinance was repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision of the state court was in favor of the validity of said ordinance.

II. The opinion of the Supreme Court of Missouri was rendered and filed in the office of the clerk of that court on April 10, 1967 (Trs. 36-39). Appellant's motion for rehearing or in the alternative to transfer to the Court en Banc was overruled by that court on May 8, 1967 (Trs. 43). Notice of appeal to this court was filed in the Supreme Court of Missouri on May 24, 1967 (Trs. 44).

III. Jurisdiction is conferred on this court by Title 28, U.S.C.A., Section 1257 (2).

IV. The following cases sustain jurisdiction:

Winters v. *New York*, 68 S. Ct. 665, 333 U.S. 507, 92 L. Ed. 840.

Bantam Books, Inc. v. *Sullivan*, 83 S. Ct. 631, 372 U.S. 58, 9 L. Ed. 584.

Lovell v. *City of Griffin*, 303 U.S. 444, l.c. 450.

Sherman v. *United States*, 10 F.2d 17, l.c. 18.

Ex parte Smith, 36 S.W. 628, 135 Mo. 223.

State v. *Paillou*, (Mo.) 321 S.W.2d 445.

State v. *Rider*, 1 S.W. 825, 90 Mo. 54, l.c. 60.

16A C.J.S., Section 580.

V. The validity of the following municipal ordinance as it appears in the Revised Ordinances of Kansas City, 1956, Section 23.110, is the basis of this appeal:

"Section 23.110. Unlawful to possess a federal wager stamp.—It shall be unlawful for any person within the corporate limits of Kansas City, Missouri, to possess with intent to use for gambling purposes, a

federal wagering stamp as provided by the provisions of the internal revenue code of 1954, as amended, enacted by the Congress of the United States.

"Each day any person possesses, with intent to use for gambling purposes, within the corporate limits of Kansas City, a federal wagering stamp shall constitute a separate offense. Any person violating the provisions of this section shall be guilty of a misdemeanor."

(c) The following federal questions are presented by this appeal:

I. Whether a city may lawfully enact an ordinance which provides for conviction and punishment for the intent to use a federal wagering stamp for gambling purposes, unconnected with any overt act of gambling. The foregoing ordinance does not prohibit the possession of the wagering stamp, nor does it require that the possessor of the stamp be actually engaged in gambling in order to be in violation of the ordinance. It is directed solely against the intent to use the wagering stamp for gambling purposes, and the state court has held that it is wholly unnecessary for the prosecution to prove that any overt act of gambling is ever committed (Trs. 38, 39).

II. The ordinance on its face and as interpreted by the state court is so vague and confusing that it is impossible to determine its meaning and application. The opinion of the state court recognizes that possession of the stamp is not unlawful, but that court held that proof of the possession of the stamp is sufficient proof of the intent to use the stamp for gambling purposes, and that the trial court erred in holding that proof of an overt act of gambling would be required for conviction under the ordinance (Trs. 37 to 39).

III. The opinion of the state court places the burden of proof upon the defendant charged with the violation of the ordinance rather than upon the prosecution, in that said

opinion holds in effect, that while one charged with the violation of said ordinance may prove his innocence, unless he does so, the prosecution need only prove his possession of the stamp in order to convict (Trs. 37, 39).

(d) The appellant was charged with the violation of the aforesaid ordinance by the following information filed in the Municipal Court of Kansas City, Missouri (omitting caption and signature):

> "On information, the below named, Assistant City Counselor within and for Kansas City, County of Jackson, and State of Missouri, complains and informs the Court that on or about the 16 day of Nov. A.D., 1965, within the corporate limits of Kansas City, and in and upon 2611 Bales one Albert C. Lee then and there unlawfully did possess a federal wagering stamp with intent to use same for gambling purposes.
>
> "All in violation of Section 23.110 of the Revised Ordinances of 1956 of Kansas City, Missouri, as amended." (Trs. 4).

At the same time and in another information the appellant was charged with the unlawful possession of gambling equipment on the same date. In municipal court the appellant was found guilty of possession of gambling equipment, but the court sustained appellant's motion to quash the above information charging possession of a federal wagering stamp on the ground that Section 23.110 of the Revised Ordinances of 1956, was unconstitutional (Trs. 6). The City appealed and on trial de novo in the Circuit Court of Jackson County, Missouri, the appellant renewed his motion to quash the aforesaid information and said motion was sustained and the defendant discharged (Trs. 28). The trial court made the following findings of fact:

> "1. (Repetition of Section 23.110 of the Ordinances omitted)

2. The defendant, Albert C. Lee, did on November 16, 1965 lawfully possess within the corporate limits of Kansas City, Missouri a federal wagering stamp duly purchased and issued to him.

3. The defendant on November 16, 1965 possessed gambling equipment at the same time he possessed said federal wagering stamp.

4. The defendant did not commit any overt act preparatory to or constituting an act of gambling."

The court's conclusions of law were as follows:

"1. Possession of the gambling equipment constituted a separate offense and a conviction therefor may not be considered as proof of the 'intent to use for gambling purposes' requisite to conviction under Section 23.110.

2. Prosecution for violation of a municipal ordinance is a civil action having criminal or quasi-criminal aspects; it is governed in the circuit court by the rules of criminal procedure; and Federal and State constitutional guarantees apply to the accused.

3. Possession by the defendant of the federal wagering stamp was not illegal per se.

4. Legal possession of a gambling stamp, accompanied by an intent to use for gambling purposes but unaccompanied by an overt act toward the perpetration of an act of gambling does not constitute an offense under Section 23.110.

5. The ordinance in question is in contravention of Article I Section 10 of the Constitution of Missouri 1945 and Section 1 of the Fourteenth Amendment to the Constitution of the United States as constituting a denial of due process of law."

"The Judgment of the Court is that the issues be found for the defendant and against the City of

Kansas City, Missouri and that the information herein be dismissed and the defendant discharged with his costs" (Trs. 26 to 28).

The City appealed to the Supreme Court of Missouri, and this appellant's assignment of errors and oral argument on that appeal was confined solely to the question of the constitutionality of said ordinance. The Supreme Court of Missouri held that the ordinance did not violate the due process clause of the state or federal constitutions and that the trial court erred in so holding (Trs. 38). That court held that "While the possessor of such a stamp is free to show he bought it for an innocent purpose, the City Council of Kansas City as the repository of the police powers of the city would be justified in viewing with suspicion and concern the possession of such stamps by its residents." That the "ordinance is directed against possession with certain intent of an article which can reasonably be expected, if something is not done about it, to be used to violate the gambling laws" (Trs. 37). The court said that "the ordinance does not permit a conviction merely by showing that the defendant has an intent to gamble. It requires proof of possession of a federal wagering stamp with intent to use it for gambling purposes" (Trs. 38). That "proof of an overt act of gambling would be admissible on the question of intent, but the trial court was in error in holding that the prosecution has to prove overt gambling in order to show an offense under the ordinance" (Trs. 39).

(e) This ordinance does not prohibit the use of a wagering stamp for gambling purposes, it is directed solely against the possession of the stamp with an intent to use it at some future time for an illegal act. It seeks to prohibit that which the law does not make an offense, that is, the intent to commit an act unconnected with any overt

act to carry out the intent. As was said in the very early case of *State* v. *Rider*, 1 S.W. 825, 90 Mo. 54, l.c. 60, the mere intent to commit a crime is not a crime and a person may arm himself for the purpose of seeking and killing an adversary, and may seek and find him, but if he is guilty of no overt act he commits no offense. The same may be said in this case. Although the appellant may arm himself with a federal wagering stamp with the intent to use it for gambling purpose, and even possess gambling equipment as the appellant did in this case, yet if he performs no overt act of gambling he has committed no offense.

Both the ordinance on its face and its interpretation by the state court fails to meet the test of definiteness and certainty which is required by the due process clause. Since possession of the stamp does not constitute an offense, the opinion of the state court to the effect that the trial court was in error in holding that the prosecution has to prove overt gambling in order to show an offense under the ordinance, is so confusing and contradictory as to render said ordinance meaningless, and so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." 16A C.J.S. 580; *Winters* v. *New York, supra; Bantam Books, Inc.* v. *Sullivan, supra.*

Possession of the wagering stamp cannot be both lawful and unlawful, and if possession without intent to use for gambling purposes is lawful, then it must necessarily follow that something more than proof of possession would be required to prove intent to use said stamp for gambling purposes. Neither the courts nor the defendant charged with the violation of this ordinance could possibly understand the nature of the offense under the ordinance, or what evidence would support it. If proof of an overt act of gambling is not required to prove the intent, then it would be difficult for a defendant to determine what conduct on

his part would constitute a violation of the ordinance, and equally difficult for a court to determine his guilt or innocence.

The opinion indicates that a defendant charged with violation of the ordinance may prove his innocence, and by this statement the court in effect held that if he fails to do so, he may be convicted by proof of his possession alone (Trs. 37). This places upon the defendant the burden of proving his innocence rather than requiring the prosecution to prove his guilt.

While the act in question is a municipal ordinance it is held that where a municipal ordinance is adopted under state authority, as in this case, it constitutes state action and is within the prohibition of the Fourteenth Amendment. *Lovell* v. *City of Griffin, supra.*

For the foregoing reasons this court has jurisdiction of this appeal, and the questions presented are so substantial as to require plenary consideration by this court, with briefs on the merits and oral argument for their resolution.

WHEREFORE, appellant prays that this court take jurisdiction of this appeal, and that briefs and oral argument be permitted on the merits.

LILLIE KNIGHT
709 Professional Building
Kansas City, Missouri 64106
W. RAYMOND HEDRICK
614 Law Building
Kansas City, Missouri 64106
Attorneys for Appellant